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EXAMINER

ANDERSON, CATHARINE L

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 20

Application Number: 09/529,638

Filing Date: June 05, 2000

Appellant(s): CARLBARK ET AL.

MAILED

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GROUP 3700

William C. Rowland
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 07 January 2003.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The rejection of claims 1-3 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

5,706,524 Herrin et al. 01-1998

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-3 rejected under 35 U.S.C. 102(e). This rejection is set forth in prior Office Action, Paper No. 13.

Claims 1-3 are rejected under 35 U.S.C. 102(e) as being anticipated by Herrin et al. (5,706,524).

Herrin discloses a garment 20, as shown in figure 1, comprising an absorbent part 21 and a waist belt 30. The waist belt 30 comprises two separate belts, as shown in figure 2, which extend in the longitudinal direction. One end of each of the two separate belts is fastened to the absorbent part 21, as shown in figure 1, and the opposite ends of the two separate belts are fully capable of being fastened together around the wearer of the garment 20. The waist belt 30 comprises two sheets 31 and 32, as shown in figure 5, with elastic members 33 attached to the sheets, running parallel to each other in the longitudinal direction of the waist belt 30. The sheets 31 and 32 are inherently of different stiffness than the elastic members 33, giving the waist belt 30 a stiffness that varies extending in the longitudinal direction of the waist belt 30.

With respect to claim 2, the two parts of varying stiffness, the sheets 31 and 32, and the elastic members 33, are mutually adjacent, as shown in figure 4.

With respect to claim 3, the longitudinally extending elastic members 33 are located in the central part of the waist belt 30, with the sheets 31 and 32 at the longitudinally extending edges, as shown in figure 4.

(11) Response to Argument

In response to appellant's argument that Herrin does not disclose two belts that are intended to be fastened together around the waist of a wearer, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Herrin remains silent as to an intent for the belts to be fastened together around the waist of a wearer, but the structure of the belts disclosed by Herrin allows for the capability of the belts to be fastened together.

Appellant argues the belts disclosed by Herrin are not intended to reach each other, and are shown in figure 1 as having a sizable gap between their free ends. Herrin does not explicitly teach that the belts may not reach each other. The belts are disclosed as comprising elastic, and are therefore capable of being stretched beyond their relaxed state. Further, the ability of the belts to reach each other around the waist of a wearer depends on the size of the wearer. On a relatively small wearer, the belts are fully capable of reaching each other.

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Appellant argues the belts disclosed by Herrin cannot be fastened together, as there is no teaching of fastener 36 being able to attach to fastener 37. Herrin discloses an embodiment of the invention, shown in figures 7, 8, and 9, wherein each end of the belts 30 comprises two fasteners. The fasteners are shown in figure 8 as 36a, 36b, 37a, and 37b. Each of the fasteners 36a, 36b, 37a, and 37b may be either hook or loop fastener, as disclosed in column 6, lines 41-45. It is within the scope of the invention for each belt 30 to comprise one hook fastener (i.e. 36a and 37a) and one loop fastener (i.e. 36b and 37b), thereby making it possible to fasten the ends of the belt together. Additionally, the instant claim does not disclose a means for fastening the belts together. The belts may be tied together at their free ends.

Appellant argues the belts disclosed by Herrin are not intended to be fastened together, and fastening the belts together would alter the operation of the garment disclosed by Herrin. Fastening of the belts together around the waist of a wearer at the front of the absorbent part of the garment would not alter the operation of the garment. The tension created by the belt portions, which comprise elastic members, would be capable of holding the absorbent part of the garment in place, thereby allowing for the garment to continue to function as intended by Herrin. It is noted that the examiner does not intend to modify the garment disclosed by Herrin, but rather intends to point out the inherent capability of the garment of Herrin to fulfill all the limitations of the claimed invention. Arguments related to the supporting of the front of the absorbent portion of the garment by the belts are moot as such is not claimed. In as much as Appellant has not claimed that the ends of the belt support or are intended to support

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the front of the absorbent part of the garment, Herrin provides identical structure and is understood to support as much as does the instant invention. Appellant is arguing more narrow than the claimed invention.

Appellant argues the fastening of the belts together in the front of the garment provides greater comfort to the wearer. The instant specification does not support this allegation. The instant specification discloses on page 6, lines 20-34, that wearer comfort is improved by varying the stiffness in the cross-direction of the belts, so the belts may conform to the shape of the wearer's body. The instant specification fails to disclose any advantage fastening the belts together in the front of the garment holds over fastening the belts directly to the front of the garment. Both embodiments of the invention are disclosed in the instant specification on page 5, lines 18-22.

Herrin discloses a garment that fulfills all the limitations of the claimed invention, both directly and indirectly recited. Herrin discloses a garment comprising an absorbent part 21 and a waist belt 30. The waist belt 30 comprises two separate belts, as shown in figure 2, which extend in the longitudinal direction. The two separate belts are fully capable of being fastened together around the waist of a wearer, as discussed above. Herrin remains silent as to the intent to fasten the belts together, but discloses a garment having a structure that allows for the capability of the belts being fastened together. Herrin therefore discloses a garment that is inherently capable of fulfilling all the limitations of the instant claim.

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Accordingly, Herrin provides the structure of the claimed invention and, as discussed above, clearly provides the capability of fastening the belts together. Herrin is therefore significantly relevant to the patentability of the instant invention.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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July 23, 2003

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